IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 13, 2009

STATE OF TENNESSEE v. GEORGE ANTHONY BELL

Direct Appeal from the Criminal Court for Sumner County
No. CR305-2007 Dee David Gay, Judge

No. M2008-01187-CCA-R3-CD - Filed November 19, 2009

A Sumner County jury found the Defendant guilty of selling more than .5 grams of cocaine, a Schedule II controlled substance, and the trial court sentenced him to eighteen years in the Tennessee Department of Correction. On appeal, the Defendant contests the trial court's admission of evidence, the sufficiency of the evidence, and the trial court's sentencing procedures. After a thorough review of the record and the applicable law, we conclude the trial court erred when it sentenced the Defendant. However, following a careful de novo review of the Defendant's sentence, we affirm the sentence imposed by the trial court. As such, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

David A. Doyle and N. Kee Bryant-McCormick, Gallatin, Tennessee, for the Appellant, George Anthony Bell.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; J. Ross Dyer, Assistant Attorney General; L. Ray Whitley, District Attorney General; Lytle Anthony James, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant's involvement in a controlled buy conducted by the Gallatin Police Department on November 9, 2006. The Defendant was indicted for selling more than .5 grams of cocaine, a Schedule II substance. At the Defendant's trial, the following evidence was presented: Officer Jerry Carpenter of the Gallatin Police Department testified that he participated in a controlled buy on November 9, 2006, during which an informant bought cocaine from the Defendant. Officer Carpenter said an informant alerted him about a man named "Jerry Johnson"

who was selling cocaine from the Country Inn Motel[1] on Highway 231 in Sumner County. Officer Carpenter worked with Investigator Don Hardin of the Drug Task Force and an informant to set up a controlled buy. The three met at an undisclosed location where, per protocol, the informant was searched for drugs and money and equipped with a body wire. The informant then called the Defendant, who instructed the informant to meet him at a residence on Highway 231. Carpenter drove the informant to a residence where they believed the Defendant to be, and Investigator Hardin followed in a separate car. When they arrived at the residence, however, they became aware the Defendant was not at the residence but rather at the Country Inn Motel. Accordingly, they proceeded to the motel to meet the Defendant.

When the informant and Officer Carpenter arrived at the motel, the Defendant and an unidentified man instructed Officer Carpenter to park in a single-car garage attached to the motel room. Officer Carpenter did not expect to pull into any building and doing so made him nervous. He said he then became frightened when the Defendant put his head into the passenger side of the car and insisted Officer Carpenter come into the motel room. The officer explained he was nervous because he was wearing his badge and gun on his right side, and he did not know if the Defendant had seen them. Ultimately, only the informant and the Defendant went inside the motel room, while Officer Carpenter remained in the garage, and the unidentified man paced behind Officer Carpenter's car. Because of the man's proximity to the car, Officer Carpenter kept the volume on the wire's transmission low, and he was not able to listen to more than "bits and pieces" of the conversation taking place inside the motel room. As the informant and the Defendant left the motel room, Officer Carpenter overheard the informant assure the Defendant that Officer Carpenter was not an undercover officer. The informant then got into the car and Officer Carpenter drove away from the motel.

As Officer Carpenter pulled onto Highway 231, the informant gave him the cocaine he purchased during the controlled buy. Officer Carpenter turned the cocaine over to Investigator Hardin when they met him after the buy. When Officer Carpenter later listened to the recording from the body wire, he identified the informant's and the Defendant's voices.

On cross-examination, Officer Carpenter testified that he did not hear the unidentified man's voice on the recording of the controlled buy, but he acknowledged that the tape was hard to understand. Also, he testified he saw no weapons or drugs on the Defendant at the motel. The officer was not aware of a recording made of a conversation the Defendant had while in jail. He explained that the informant was not available to testify because he had left the state.

Investigator Don Hardin of the Sumner County Drug Task Force testified the Task Force organized the controlled buy in this case because multiple law enforcement agencies reported that someone fitting the Defendant's description, but known as "Jerry Johnson," was distributing cocaine from the Country Inn Motel. The officer testified that his investigation revealed that "Jerry Johnson" is the Defendant's alias.

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[1] There are discrepancies in the record about the motel's name.

Investigator Hardin testified that he met with Officer Carpenter and the informant on the day of the controlled buy. After meeting the informant, he searched the informant and determined that the informant carried no money, drugs, or weapons. He then gave the informant money to buy the drugs and attached a body wire to the informant. Officer Hardin testified that someone, though he did not specify who, called a telephone number they had for "Jerry Johnson." A male answered and instructed them to meet him at a house located at 1930 Highway 231 South.

The three then traveled to the house at 1930 Highway 231 South, but the Defendant was not at the house. Information they received at the house, however, led them to believe the Defendant was waiting for them at the Country Inn Motel. Accordingly, the group drove to the motel, where Investigator Hardin parked in front of the motel room, and Officer Carpenter parked behind the motel room.

Through the informant's bodywire, Investigator Hardin heard the drug transaction as it took place. He heard both Officer Carpenter and the informant make contact with the Defendant and ask Officer Carpenter if he was a police officer and if he "got high." He also heard the Defendant try to persuade Officer Carpenter to come inside the room, an offer which Officer Carpenter declined. Investigator Hardin said he then heard the informant enter the motel room and discuss that a quarter ounce of cocaine should cost $250. While the informant was inside the room, Investigator Hardin heard the Defendant tell the informant that he was "spooked" by Officer Carpenter and that he thought Officer Carpenter was a police officer. Investigator Hardin said that he next heard something about needing to "break a piece off" and the informant saying he did not have a "stem," which is a device used to smoke crack cocaine. Then, Investigator Hardin heard the informant leave the room.

When Investigator Hardin reunited with Officer Carpenter and the informant after the controlled buy, Officer Carpenter gave the investigator the cocaine, which was wrapped in a piece of cigarette cellophane. After Investigator Hardin drove the informant home, he sealed the cocaine in an envelope and deposited it into the evidence vault at the Drug Task Force office. Investigator Hardin explained he did not arrest the Defendant immediately after the controlled buy because he "hoped to go into a larger quantity or further up the food chain," and he did not want to compromise the informant's identity. Investigator Hardin testified that, when the Defendant was arrested, he possessed a cell phone registered to the number they dialed to reach "Jerry Johnson" to set up the transaction.

Investigator Hardin identified three voices on the tape of the drug transaction as those of Officer Carpenter, the informant, and the Defendant. Investigator Hardin testified he delivered the substance he received from the informant to the Tennessee Bureau of Investigation ("TBI") for processing.

On cross-examination, Investigator Hardin acknowledged he could not identify a fourth voice on the tape. However, based on the interaction with Officer Carpenter, the fourth voice was talking

outside of the motel room. He also said that, although the phone call placed to "Jerry Johnson" at the original meeting location to set up the transaction was taped, he could not locate the tape.

Richard Barton, the Director of the 18th Judicial District Drug Task Force, testified that he was in charge of receiving evidence. He explained that an officer should seal the drugs or evidence in an envelope and then place it in a locked, secure box in the Task Force office. Officer Barton would then remove the envelope and put it in the evidence locker until it is time for the evidence to be transported to TBI for processing. Every movement of the evidence is logged, and Officer Barton said he was the only person with a key to the evidence locker. On cross-examination, Officer Barton said that he did not know the Defendant or the informant and that he did not remove the drugs from the Defendant.

Patti Choatie, a forensic scientist who specializes in drug chemistry at the TBI, testified that she tested the substance received from the informant. Her tests revealed the substance was 1.6 grams of cocaine.

The Defendant chose not to testify or present proof. After the jury heard all the evidence, it convicted the Defendant of possession of over .5 grams of cocaine, a Schedule II controlled substance. The trial court then considered the Defendant's presentence report and sentenced the Defendant, as a Range II multiple offender, to serve eighteen years. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant claims that: (1) the trial court improperly admitted evidence against him; (2) the evidence is insufficient to support his conviction; and (3) the trial court erred when it sentenced him.

A. Admission of Evidence

The Defendant challenges the trial court's admission of the informant's statements through Investigator Hardin's testimony and through the audio recording of the controlled buy, arguing that the admission violated his constitutional right to confront adverse witnesses and that Investigator Hardin's testimony and the audio recording are inadmissible hearsay. Finally, he argues the admission of the testimony violated the best evidence rule, and the admission of the audio recording was in error because, due to its poor quality, its prejudicial effect outweighed its probative value. Finally, he contends the trial court committed plain error when it admitted testimony about a cellular telephone seized from the Defendant upon his arrest.

1. Confrontation Clause Objections to Investigator Hardin's Testimony and the Audio Recording

The Defendant contends that his constitutional right to confront his accusers was violated when the trial court admitted the informant's statements through the testimony of Investigator Hardin and through the audio recording of the transaction. Citing *Crawford v. Washington* and several subsequent federal cases applying *Crawford* to statements by a non-testifying informant, the Defendant argues that the statements were testimonial and, thus, violated his confrontation rights. *Crawford v. Washington*, 541 U.S. 36 (2004). The State responds first that a Tennessee Supreme Court decision, *State v. Jones*, which pre-dates *Crawford*, controls the instant case and allows for the statements' admission. *State v. Jones*, 598 S.W.2d 209 (Tenn. 1980). The State also argues that, even under *Crawford*, the statements are admissible because they were not offered for the truth of the matter asserted.

The Confrontation Clause of the Sixth Amendment commands: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This fundamental right of confrontation applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *see State v. Henderson*, 554 S.W.2d 117, 119 (Tenn. 1977). The Tennessee Constitution also guarantees the right of confrontation, providing "[t]hat in all criminal prosecutions, the accused hath the right to . . . meet the witnesses face to face . . . ." Tenn. Const. art. I, § 9. Although the language of the Federal and State constitutional provisions differs slightly, the Tennessee Supreme Court has "traditionally adopted and applied the standards enunciated by the United States Supreme Court" when determining an accused's right to confront under the Tennessee Constitution. *State v. Cannon*, 254 S.W.3d 287, 301 (Tenn. 2008) (citing *State v. Lewis*, 235 S.W.3d 136, 144 (Tenn. 2007)).

The Confrontation Clause bars the admission of certain out-of-court statements unless the declarant "was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. This bar applies only to statements defined by law as testimonial hearsay. *Id.*; *Davis v. Washington*, 547 U.S. 814, 823 (2006). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). The Confrontation Clause does not affect the admissibility of statements that do not fall within this traditional definition of hearsay. *See U.S. v. Maher*, 454 F.3d 13, 20 (1st Cir. 2006); *State v. Johnson*, 771 N.W.2d 360 (S.D. 2009). Regardless of whether the statement is testimonial or non-testimonial, therefore, the Confrontation Clause does not bar statements lacking assertive content, such as commands or questions. *State v. Charles O. Emesibe*, No. M2003-02983-CCA-R3-CD, 2005 WL 711898, *10 (Tenn. Crim. App., at Nashville, Mar. 28, 2005), *perm. app. denied* (Tenn. Oct. 17, 2005). Also, the Confrontation Clause does not bar a statement with assertive content but not offered for the truth of the matter asserted. *Id.*; *Crawford*, 541 U.S. at 59 n.9.

Courts have recently discussed at length the requirement that hearsay be testimonial in order to gain the Confrontation Clause's protection. *Crawford*, 541 U.S. at 53-54. Hearsay is testimonial where it takes the form of "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" or of a statement "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later

trial." *Crawford*, 541 U.S. at 51-52. The following three categories of statements are considered "testimonial":

> [1] ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and 3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. (internal quotations and citations omitted). Courts have further refined *Crawford*'s distinction between testimonial and non-testimonial statements, developing several tests that focus on the declarant's intent. *See e.g. Davis v. Washington*, 547 U.S. 813 (2006) (creating a "primary purpose" test under which courts must determine whether a statement is testimonial in that its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution"); *U.S. v. Powers*, 500 F.3d 500, 507-08 (6th Cir. 2007) (recognizing a "testimonial/nontestimonial continuum" where a confidential informant's statements were considered testimonial because they "were elicited as part of the government's investigation into the defendant's past drug activity.").

Given that an informant's general intent is to aid law enforcement, the statements an informant makes in the course of his or her interaction with law enforcement could be said to be made with the intent of aiding later criminal prosecution, which is a characteristic of the testimonial statements the Confrontation Clause bars. *See Crawford*, 541 U.S. at 51-52. However, because an informant can aid police either by directly providing police with information or by allowing police to monitor his or her illicit interaction with a target, an informant's statement may not actually take the form of hearsay and, therefore, its admission may not violate the Confrontation Clause, though it may be made with the purpose of aiding future prosecution. *See Crawford*, 541 U.S. at 59 n.9. Consequently, the admissibility of informant statements under the Confrontation Clause depends on the statement's context.

Generally, courts have held that statements made by informants directly to police violate the Confrontation Clause. *See U.S. v. Maher*, 454 F.3d 13, 21 (1st Cir. 2006); *McBee v. Burge*, No. 05-CV-4752, 2009 WL 2196768, *9 (E.D.N.Y., July 24, 2009); *Johnson*, 2009 WL 2319235, at *7. Most informant statements to police that are sought to be introduced at trial divulge information about the defendant to police and are offered to prove the truth of that information. These statements' admission, therefore, violates the defendant's right to confront his accusers because it is both testimonial and hearsay. *Maher*, 454 F.3d at 21; *McBee*, 2009 WL 2196768, at *9; *Johnson*, 2009 WL 2319235, at *7. In limited instances the State may introduce such statements in order to explain why police investigated a certain target. *See United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004). These instances are few and far between, however, and the Clause allows for the

admission of only so much of the informant's statement that is necessary to demonstrate what caused police to investigate the target. *Id*.

In contrast to their treatment of informant statements made directly to police, courts have generally held that informant statements made during a recorded conversation between the informant and a non-law enforcement party do not violate the Confrontation Clause. *See, e.g., Johnson*, 2009 WL 2319235, *6. In this situation, the informant generally does not divulge information but rather converses with a third party in order to expose a target's criminal acts to police. As a consequence, the fact of the informant's interaction with a third party rather than the substance of his statements during that interaction is the chief focus of law enforcement and, later, of a criminal trial. In the analogous situation of a recorded conversation at a crime scene between a defendant and a party unaware of the recording, this Court has held the party's statements were offered to establish context for a defendant's admissible statements instead of the truth of the matter asserted. *State v. Derrick Sorrell*, No. W2006-02766-CCA-R3-CD, 2009 WL 1025873, *5 (Tenn. Crim. App., at Jackson, Apr. 8, 2009), *perm. app. denied* (Tenn. Aug. 17, 2009); *also see United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006) ("Statements providing context for other admissible statements are not hearsay because they are not offered for their truth."). In summary, statements made during recorded conversations between an informant and a non-law enforcement party generally are admissible because they are not offered for the truth of the matter they assert. *See Crawford*, 541 U.S. at 59 n.9.

Our analysis of whether the Confrontation Clause bars the statements at issue, therefore, involves several inquiries: (a) whether the statements contain assertions; (b) whether the statements are testimonial; and (c) whether the statements are offered for the truth of the matter they assert.

The Defendant alleges that his constitutional right to confront his accusers was violated when the trial court admitted the informant's statements during the controlled buy through Investigator Hardin's testimony and through the audio recording of the controlled buy. The Defendant moved to suppress the audio recording based on the Defendant's right to confront the informant, and the trial court denied the motion, finding that the statements on the recording were not offered to prove the truth of the matter asserted and, thus, did not constitute material protected by the Confrontation Clause. Similarly, when defense counsel objected to Investigator Hardin's testimony about the informant's statements during the controlled buy, the trial court admitted the statements, and instructed the jury to not consider the informant's statements as substantive evidence or for the truth of the matter asserted, explaining that the statements "just help[] us go through the conversation."

The State introduced and played the audio recording of the controlled buy between the informant and the Defendant during Investigator Hardin's testimony. Investigator Hardin identified the informant's and the Defendant's voices on the recording, and he explained that, although the recording was "poor," he was able to clearly hear the conversation when he listened contemporaneously through the informant's body wire. Although the record does not contain a transcript of the audio recording, which defense counsel asserted at trial to be "inaudible," it contains the audio recording itself. On the recording, the informant and the Defendant can be heard engaging in casual conversation, with references to the informant's mother's health and his upcoming

paycheck, but little else is decipherable. Investigator Hardin's testimony, therefore, contained the bulk of the statements at issue in this appeal.

Investigator Hardin testified about the conversation between the informant and the Defendant, which he monitored through the informant's body wire:

> **Investigator Hardin**: He, Investigator Carpenter, refused to go into the room, but apparently the informant did go in the room with [the Defendant]. They discussed cocaine. They discussed the price of a quarter ounce of cocaine being $250. The [D]efendant initially expressed his reluctance to – and I quote, serve, the informant because he was spooked by Investigator Carpenter's presence there at the scene at one point in time.
>
> You know, they walked back after completing the transaction. I know that in the room there was something about, break a piece off or something, referring to the cocaine, and the informant responded that he didn't have a stem with him. A stem known to me through my employment and years in law enforcement often refers to a –
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> [Defense Counsel objected to the investigator testifying about the informant's statements, and the trial court overruled the objection, finding the State did not offer the statements to prove the truth of the matter asserted.]
>
> . . . .
>
> **Investigator Hardin**: I heard [the Defendant] try to get the informant to break a piece off, referring to the cocaine to try it. That didn't happen, and the statement was, because I don't have a stem. A stem being what I know to be used – a device that I know to be used to smoke crack cocaine.

In summary, the trial court admitted three statements by the informant: (1) a "discussion" of cocaine; (2) a declaration that the price of the cocaine he was purchasing was $250; (3) a response to the Defendant that he did not have a "stem" with which to smoke the crack-cocaine.

As discussed above, the statements' admissibility depends on whether they contained assertions, whether they were introduced to prove the truth of those assertions, and whether they were testimonial. First, we conclude that each statement contained an assertion. The first made

general assertions about cocaine, the second asserted the price of the crack cocaine the informant purchased, and the third asserted that the informant did not possess a stem with which the Defendant could smoke the crack cocaine.

Second, we conclude that the statements were not introduced to prove the truth of these assertions. The general characteristics of cocaine, the price of the crack-cocaine the informant purchased, and the informant's possession of a "stem" are not relevant to whether the Defendant sold drugs. The informant's statements, therefore, were not introduced to prove these assertions. Instead, the State introduced the statements to prove that the informant and the Defendant had a conversation that concerned cocaine and its price. From this fact, in conjunction with other facts demonstrated by the proof, such as the fact that the informant left the conversation with a bag of cocaine, the trier of fact deduced that the Defendant sold the informant crack-cocaine. The trier of fact would have deduced this regardless of the price of the crack-cocaine and whether the informant possessed a "stem." Because the truth of the informant's statements were never in issue, the informant's statements were not introduced to prove the truth of the matter asserted. *See Johnson*, 2009 WL 2319235, at *6.

Furthermore, the informant's statements gave context to the Defendant's admissible statements. Investigator Hardin's testimony and the audio recording contained several statements by the Defendant. For example, Investigator Hardin testified that the Defendant told the informant he was afraid Officer Carpenter was an undercover officer. The Defendant's statements constitute admissions by a party-opponent and, as such, are by definition not hearsay under Rule 801(c) and, thus, do not offend *Crawford*. Admission of the informant's statements provided context for the Defendant's admissible statements, illuminating their meaning to the jury. *See Sorrell*, 2009 WL 1025873, at *5; *Tolliver*, 454 F.3d at 666. As such, because they were not offered for their truth, they were not hearsay, and their admission did not offend *Crawford*. *Id*.

Because we have concluded that the admission of the informant's statements did not offend *Crawford*, it is unnecessary for us to address the issue of whether the *Crawford* decision has effectively overruled our Supreme Court's opinion in *Jones*. *See Crawford*, 541 U.S. at 53; *State v. Jones*, 598 S.W.2d 209, 223 (Tenn. 1980).

In summary, the informants' statements were not hearsay, and their admission through the audio recording and Investigator Hardin's testimony did not violate the Confrontation Clause, regardless of whether the statements were testimonial. *See Crawford*, 541 U.S. at 59 n.9. The Defendant is not entitled to relief on this issue.

2. Hearsay Objections to Informant's Statements

In the alternative to his confrontation clause objections, the Defendant contends the informant's statements, offered through Investigator Hardin's testimony and through the audio recording itself, constitute hearsay and were therefore admitted contrary to state evidentiary law. The

State responds that the statements were not hearsay because they were not offered for the truth of the matter asserted.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). As a general rule, hearsay is not admissible during a trial, unless the statement falls under one of the exceptions to the rule against hearsay. Tenn. R. Evid. 802.

As previously discussed, the State did not introduce the informant's statements to prove the truth of the matter they asserted. The statements instead were offered to show that the Defendant was inside a motel room from which the informant exited carrying crack-cocaine. They were also admitted to give context to the Defendant's statements during the controlled buy. As such, the statements are not hearsay and Tennessee Rule of Evidence 801(c) does not bar their admission. The Defendant is not entitled to relief on this issue.

3. Best Evidence Rule Objection to Investigator Hardin's Testimony

The Defendant contends the officer's testimony about the contents of the audio recording of the drug transaction violated the best evidence rule. The State responds that the officers' testimony was introduced only to lay a foundation for the admission of the audio recording. To this, the Defendant rejoins that the officer testified about the contents of the recording, exceeding the traditional bounds of foundational testimony.

The best evidence rule requires the production of the original audio recording to prove its contents unless the audio recording is shown to be unavailable for some reason other than the serious fault of the proponent. American Jurisprudence § 1049. Tennesssee Rule of Evidence 1002 adopts this rule. Where, therefore, an original copy of an audio recording is available, and the proponent offers testimony about the contents of a recording, the best evidence rule is not offended as long as the copy of the audio recording is introduced at trial. *See State v. Willie Nathaniel Smith*, No. W2001-02973-CCA-R3-CD, 2003 WL 103206, at *6 (Tenn. Crim. App., at Nashville, Jan. 9, 2003), *no Tenn. R. App. P. 11 application filed*.

In this case, the State introduced the audio recording itself into evidence, the investigator's testimony did not offend Rule 1002's best evidence rule. Consequently, we need not address whether Investigator Hardin's testimony about the audio recording was foundational and not substantive because the State had already entered the best evidence of the recording as an exhibit. *See* Tenn. R. Evid. 1002; *Smith*, 2003 WL 103206, at *6. As such, the Defendant is not entitled to relief on this issue.

4. Evidentiary Reliability of the Audio Recording

The Defendant contends the admission of the audio recording contravened Rule 403 of the Tennessee Rules of Evidence because the risk of prejudice outweighed the statements' probative

value. He argues that the introduction of the largely inaudible recording created a risk that the jury would make assumptions about what the tape contained by virtue of its being held out by a police officer as a recording of a drug transaction.

Under Rule 401, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Rule 402 states, "All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible." Tenn. R. Evid. 402. Finally, Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. "The decision regarding the admissibility of photographs pursuant to these Rules lies within the sound discretion of the trial court and will not be overturned on appeal absent a clear showing of an abuse of that discretion." *State v. Young*, 196 S.W.3d 85, 105 (Tenn. 2006) (citing *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978)).

We conclude the Defendant failed to show the trial court abused its discretion when it admitted the audio recording. The audio recording of the controlled buy was presented after Investigator Hardin testified about what he heard the informant say during the controlled buy. Because the recording contained few audible statements related to the drug sale, Investigator Hardin's testimony was the chief source of the informant's statements. The recording's relevance, therefore, did not lie in its communication of the informant's words but rather in its tendency to corroborate Investigator Hardin's and Officer Carpenter's testimony that the informant and the Defendant were present at the motel, where the informant purchased drugs from the Defendant.

The Defendant argues that the recordings prejudiced the Defendant because they presented the risk that the jury would infer that a transaction occurred simply because the recording was presented by a law enforcement officer. We conclude that, because the jury had before it ample evidence of the Defendant's guilt, it need not have inferred the Defendant's guilt simply from the fact the recording was presented by a law enforcement officer. As such, the risk of unfair prejudice was nominal at best and did not outweigh the recording's probative value of corroborating Investigator Hardin and Officer Carpenter's testimony by establishing the Defendant's presence in the motel room. The Defendant is not entitled to relief on this issue.

5. Admission of Testimony about Cellular Telephone as Plain Error

In the Defendant's arguments attacking the sufficiency of the evidence supporting his conviction, the Defendant argues the trial court committed plain error when it admitted testimony about the cellular telephone seized from the Defendant upon his arrest. We will address the issue of the testimony's admissibility before we address the Defendant's arguments about the sufficiency of the evidence.

At trial, Officer Carpenter testified that the number displayed by the cellular phone seized from the Defendant upon his arrest matched the number dialed to reach the man who sold the informant cocaine in the controlled buy. The Defendant contends the display of the number on the Defendant's cellular phone constituted hearsay because it was an out of court statement offered to prove the truth of the matter it asserted. Acknowledging he failed to contemporaneously object to the cellular phone number when it was introduced at trial, the Defendant argues the trial court's admission of the cellular phone number was plain error, which requires reversal despite his failure to properly preserve the error for appeal. *See* Tenn. R. App. P. 36(a); Tenn. R. Crim. P. 52(a). He argues that its erroneous admission resulted in undue prejudice to the outcome of his trial because it was the only piece of direct evidence linking him to the controlled buy.

Whether an issue rises to the level of plain error is a decision that lies within the sound discretion of the appellate court and may be considered: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process, prevent manifest injustice, or to do substantial justice. *See* Tenn. R.App. P. 13(b); Tenn. R.Crim. P. 52(b); *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (adopting *State v. Adkisson*, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994)). In *Adkisson*, this Court stated that the following factors should be considered by an appellate court when determining whether an error constitutes "plain error": (a) the record must clearly establish what occurred at the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the issue is "necessary to do substantial justice." *Adkisson*, 899 S.W.2d at 641-42 (citations omitted). Our Supreme Court characterized the *Adkisson* test as a "clear and meaningful standard" and emphasized that each of the five factors must be present before an error qualifies as plain error. *Smith*, 24 S.W.3d at 282-83.

We cannot conclude that the trial court breached a clear and unequivocal rule of law. As discussed above, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). In this case, the cell phone's display of the number dialed to reach the Defendant during the controlled buy is not a "statement" within the meaning of the prohibition against hearsay. Tenn. R. Evid. 801(c). A witness's first-hand observations and experiences are not hearsay because they do not involve a witness's relation of a statement. When Investigator Hardin testified about the cell phone the Defendant was carrying when he was arrested, he was not relating a statement but rather his own personal observation about the cell phone he recovered. As such, Investigator Hardin's testimony neither raises hearsay concerns nor rises to the level of plain error. Therefore, the Defendant is not entitled to relief on this issue.

B. Sufficiency of the Evidence

The Defendant contends the evidence presented was insufficient to support his conviction. Specifically, he points to: (1) the absence of the informant's testimony; (2) the lack of proof

regarding the potential presence of a third party during the controlled buy; and (3) the State's failure to search the informant directly before he entered the motel room.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "'A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (*State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

"'Circumstantial evidence' differs from direct evidence, and consists of proof of collateral facts and circumstances from which the existence of the main fact may be deduced according to reason and common experience of mankind." *Webb v. State*, 203 S.W. 955, 955 (Tenn. 1918); *accord Bishop v. State*, 287 S.W.2d 49, 50 (Tenn. 1956).

A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). Stated differently, "[B]efore an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances 'must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford*, 470 S.W.2d 610, 612 (1971). "A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Id.* The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

Tennessee Code Annotated provides that it is an offense for a person to knowingly sell a controlled substance. T.C.A. § 39-17-417(a)(3) (2006). Cocaine is a Schedule II controlled substance. T.C.A. § 39-17-408 (2006). Knowingly is defined as when a person acts "with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." T.C.A. § 39-11-302(b) (2006).

Before addressing the overall sufficiency of the evidence offered at trial, we address the aspects of the State's case to which the Defendant objects. First, the Defendant objects to the informant's absence at trial. Investigator Hardin testified that the Defendant and the informant engaged in conversation typical of a drug transaction, and the informant's voice was identified on the audio recording. The informant's testimony, therefore, was not necessary in order for the jury to find the necessary elements of the Defendant's convicted offense, and his absence did not render the evidence insufficient.

Second, the Defendant objects that the proof failed to disprove the presence of a third party during the controlled buy and, thus, failed to prove that the Defendant was necessarily the person who sold the informant the cocaine. The proof need not disprove any conceivable or theoretical alternative suspect. The identification of both the Defendant's and the informant's voices on the recording, along with the other proof, is sufficient for the jury to conclude beyond a reasonable doubt the Defendant was the individual in the motel room who sold the informant cocaine. The Defendant's third contention, that the officers' failure to search the informant immediately before he entered the motel room made the evidence insufficient, is similarly flawed. Because the evidence need only prove the Defendant's guilt beyond a reasonable doubt, the absence of proof that the informant did not obtain the cocaine between the initial search of his body and his exit from the motel room does not render the evidence insufficient to support his conviction.

Viewing the evidence in the light most favorable to the State, we conclude the evidence sufficiently supports the Defendant's conviction for selling a controlled substance. Investigator Hardin received information about a man selling cocaine from the Country Inn Motel. He and Officer Carpenter worked with an informant and set up a controlled buy to take place at the Country

Inn Motel. At that point, Investigator Hardin called a number to verify the buy, and a phone later found on the Defendant was registered to that number. The officers searched the informant before the buy, gave him money to buy the cocaine, and outfitted him with a body wire. Officer Carpenter then drove the informant to the controlled buy, where he spoke with a man he identified at trial as the Defendant. The informant entered the motel room with the Defendant and negotiated the price of the cocaine. The informant exited the room after paying $250 for 1.6 grams of cocaine from the Defendant, and he gave the cocaine to the officers. We conclude the evidence shows that he knowingly sold cocaine, a Schedule II controlled substance, to the informant. The evidence, therefore, is sufficient to support his conviction for selling over .5 grams of a Schedule II controlled substance, and the Defendant is not entitled to relief on this issue.

C. Sentencing

As his last issue on appeal, the Defendant contends that the trial court erred in setting the length of his sentence. Specifically, the Defendant argues the trial court improperly applied enhancement factor (13)(A) and failed to apply mitigating factor (1) to his conviction. The State concedes that the trial court erroneously applied enhancement factor (13)(A) but argues that the record supports application of enhancement factor (8), which the trial court failed to apply to the Defendant's conviction and that mitigating factor (1), as a matter of law, does not apply to cocaine sale convictions. The State urges this Court to affirm the Defendant's sentence.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). Specific to the review of the trial court's finding enhancement and mitigating factors, "the 2005 amendments deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." *State v. Carter*, 254 S.W.3d 335, 344 (Tenn. 2008). The Tennessee Supreme Court continued, "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

As we explain below in detail, we agree that the trial court erroneously applied enhancement factor (13)(A). As such, we review the Defendant's sentence de novo with no presumption of correctness. *See Ashby*, 823 S.W.2d at 169.

A. Enhancement Factors

The Defendant contends that the trial court improperly applied enhancement factor (13)(A) to his conviction. As such, the Defendant continues, the trial court failed to follow appropriate sentencing procedures, and this Court, therefore, cannot presume his sentences are correct. He argues this Court should reduce her sentence to the statutory minimum after a de novo review. The State concedes the trial court improperly applied enhancement factor (13)(A) but argues that enhancement factors (1) and (8) nonetheless support the Defendant's sentence.

The Criminal Sentencing Act of 1989 and its amendments describe the process for determining the appropriate length of a defendant's sentence. Under the Act, a trial court may impose a sentence within the applicable range as long as the imposed sentence is consistent with the Act's purposes and principles. T.C.A. § 40-35-210(c)(2) and (d) (2006); *see State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). The Tennessee Code allows a sentencing court to consider the following enhancement factors, among others, when determining whether to enhance a defendant's sentence:

> (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
>
> . . .
>
> (8) The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community;
>
> . . .
>
> (13) At the time the felony was committed, one (1) of the following classifications was applicable to the defendant:
>
> > (A) Released on bail or pretrial release, if the defendant is ultimately convicted of the prior misdemeanor or felony;

T.C.A. § 40-35-114(1), (8), (13)(A) (2006). If an enhancement is not already an essential element of the offense and is appropriate for the offense, then a court may consider the enhancement factor in its length of sentence determination. T.C.A. § 40-35-114 (2006). In order to ensure "fair and consistent sentencing," the trial court must "place on the record" what, if any, enhancement and mitigating factors it considered as well as its "reasons for the sentence." T.C.A. § 40-35-210(e). Before the 2005 amendments to the Sentencing Act, both the State and a defendant could appeal the manner in which a trial court weighed enhancement and mitigating factors it found to apply to the defendant. T.C.A. § 40-35-401(b)(2) (2003). The 2005 amendments, however, deleted as grounds

for appeal a claim that the trial court did not properly weigh the enhancement and mitigating factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 8, 9. In summary, although this Court cannot review a trial court's weighing of enhancement factors, we can review the trial court's application of those enhancement factors. T.C.A. § 40-35-401(d) (2006); *Carter*, 254 S.W.3d at 343.

The Defendant is a Range II multiple offender, and the sale of more than .5 grams of a Schedule II controlled substance is a Class B felony. T.C.A. § 39-17-417(b) (2006). Therefore, the appropriate range for the Defendant's conviction is twelve to twenty years. T.C.A. § 40-35-112(a)(2) (2006). At the conclusion of the Defendant's sentencing hearing, the trial court applied two enhancement factors to the Defendant's conviction: enhancement factor (1), that the Defendant had a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; and enhancement factor (13)(A), that at the time the felony was committed the defendant was on bail or pretrial release, and the defendant was ultimately convicted of the prior misdemeanor or felony. *See* T.C.A. § 40-35-114(1) and (13)(A). The trial court gave the Defendant an enhanced sentence of eighteen years for his conviction for sale of more than .5 grams of a Schedule II controlled substance.

Neither party contests the application of enhancement factor (1). The Defendant's criminal convictions include multiple violations of the implied consent law; simple possession or casual exchange of a controlled substance, third offense; possession of a controlled substance; sale of a controlled substance; and failure to carry or exhibit a driver's license. Given the Defendant's prior drug possession and selling convictions, he was properly found to be a Range II, multiple offender. T.C.A. § 40-35-106(a) (2006). Further, the Defendant has a history of criminal convictions and behavior in addition to those necessary for his Range II offender status, which is necessary for application of enhancement factor (1). *See* T.C.A. § 40-35-114(1) (2006). Therefore, based on the Defendant's long criminal history, we agree that the trial court correctly applied enhancement factor (1) to enhance the Defendant's sentence. As such, we address only the applicability of enhancement factors (13)(A), which the trial court applied but each party agrees was applied in error, and (8), which the trial court did not apply, but the State argues the trial court should have applied.

i. Enhancement Factor (13)(A)

After reviewing the record, we agree with the parties that the trial court erroneously applied enhancement factor (13)(A) to the Defendant's conviction. As discussed, enhancement factor (13)(A) applies where, at the time the charge at issue was committed, a defendant was on bail or pretrial release for a charge of which he is ultimately convicted. T.C.A. § 40-35-114(1). The record in this case shows that Sumner County charged the Defendant in case number 668-2006 with one count of sale of less than .5 grams of a Schedule II controlled substance and one count of unlawful drug paraphenalia. The Defendant was alleged to have committed these crimes on June 17, 2006. The Defendant committed the offense in this case on November 9, 2006. The presentence report filed in this case indicates only that a hearing on case number 668-2006 was set to be held on September 28, 2007, approximately one month before the Defendant was sentenced in this case. The trial court, taking "judicial notice of the documents in [the trial court's] case file of Case No. 668-

2006," found that the Defendant was on bail for case number 668-2006 when he committed the crime in this case. Our review of the record reveals no document that describes the final disposition of case number 668-2006. As such, the record fails to establish both that the Defendant was on bail for case number 668-2006 when he committed the crime in this case and that he was convicted of the charges contained in case number 668-2006. Thus, the record does not demonstrate that the defendant was ultimately convicted of a charge for which he was on pre-trial release when he committed the felony in this case, as application of enhancement factor (13)(A) requires. We conclude the record preponderates against the trial court's finding that the Defendant, when he committed the crime in this case, was on bail for a charge of which he was ultimately convicted. Therefore, the trial court erred when it applied enhancement factor 13(A) to enhance the Defendant's sentence for sale of more than .5 grams of a Schedule II controlled substance.

The trial court, therefore, appropriately applied enhancement factor (1) to the Defendant's conviction but erred when it applied enhancement factor (13)(A) to the Defendant's conviction. Because of this error, we will review the Defendant's sentence de novo, with no presumption of correctness. *See Ashby*, 823 S.W.2d at 169. The erroneous application of one or more enhancement factors by the trial court does not, however, necessarily lead to a reduction in the length of the sentence. *State v. Winfield*, 23 S.W. 3d 279, 284 (Tenn. 2000).

In conducting our de novo review of a sentence, we consider the same factors that the Tennessee Code instructs a trial court to consider during sentencing: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the offense, (5) any mitigating or enhancement factors, (6) statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses; and (7) any statements made by the defendant on his or her own behalf. *See* T.C.A. § 40-35-210 (2006); *State v. Herbert H. Foster*, No. W2007–02636-CCA-R3-CD, 2009 WL 275790, *4 (Tenn. Crim. App., at Jackson, Feb. 3, 2009), *no Tenn. R. App. P. 11 application filed*.

The State argues that, although the trial court erroneously applied enhancement factor (13)(A), the trial court should have applied enhancement factor (8) to enhance the Defendant's sentence. Enhancement factor (8) applies where the defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community. T.C.A. § 40-35-114(8). The record contains a judgment form entered against the Defendant that states the Defendant was resentenced "pursuant to 40-36-106(e)(4)" for a conviction for possessing a Schedule II controlled substance for resale. Section 40-36-106(e)(4) provides that "[t]he court shall also possess the power to revoke the sentence imposed at any time due to the conduct of the defendant or the termination or modification of the program to which the defendant has been sentenced." Misconduct being grounds for modifying a sentence, the State argues that the Defendant's resentencing implies that he violated the terms of his sentence for his drug possession conviction.

The judgment to which the State refers reflects that the trial court increased the Defendant's sentence for his drug possession conviction from eight to twelve years. Other than its reference to

Tennessee Code Annotated section 40-36-106(e)(4), the trial court did not specify on the judgment or on any other document contained in the record what actions of the Defendant, if any, precipitated his resentencing. Based on the record before us, it is quite possible that the resentenceing of the Defendant pursuant to Tennessee Code Annotated section 40-36-106(e)(4) may have resulted from a termination or modification of the program to which the Defendant had been sentenced. Without further proof that the Defendant actually failed to comply with the conditions of his sentence, we cannot rely on enhancement factor (8). Therefore, in conducting our de novo review of the Defendant's sentence, we will consider only enhancement factor (1), that the Defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range. *See* T.C.A. § 40-35-114(1).

b. Mitigating Factors

The Defendant contends that the trial court's refusal to apply any mitigating factors to his sentence was in error. Specifically, he contends the absence of serious bodily harm or a risk thereof to his victims should mitigate his punishment.

As outlined above, the Sentencing Act requires this Court, in conducting its de novo review, to consider all mitigating factors applicable to the Defendant. *See* T.C.A. § 40-35-210; *Foster*, 2009 WL 275790, at *4. Section 40-35-113 contains a non-exclusive list of mitigating factors that a trial court may apply to a defendant's sentence "if appropriate for the offense." T.C.A. § 40-35-113 (2006). The list includes factor (1), which applies where "the defendant's criminal conduct neither caused nor threatened serious bodily injury." T.C.A. § 40-35-113(1). The burden of proving applicable mitigating factors rest upon the defendant. *State v. Moore*, No. 03C01-9403-CR-00098, 1995 WL 548786 (Tenn. Crim. App., at Knoxville, Sept. 18, 1995), *perm. app. denied* (Tenn., Feb. 5, 1996).

At the conclusion of the sentencing hearing, the trial court declined to apply any mitigating factor. After a review of the record, we conclude that mitigating factor (1) does not apply to the Defendant's conviction. This Court has repeatedly concluded that mitigating factor (1), that the defendant did not cause or threaten serious bodily injury, does not apply to cocaine sale convictions. *State v. Vanderford*, 980 S.W.2d 390, 407 (Tenn. Crim. App. 1997). In this case, the Defendant's conviction is for the sale of cocaine. Therefore, mitigating factor (1) does not apply to the Defendant's conviction. *See id*. As such, mitigating factors (1) does not mitigate against the Defendant's punishment, and we will not consider it in our de novo review of his sentence.

2. De Novo Review of Sentences

In conducting our de novo review of the Defendant's sentences, we consider the Defendant's presentence report, the Defendant's prior convictions, the nature and circumstances of her crimes, and the applicable enhancement and mitigating factors. *See* T.C.A. § 40-35-210.

The Defendant was found guilty of a Class B felony, and he is a Range II multiple offender. Therefore, the possible sentence range is not less than twelve nor more than twenty years. T.C.A. § 40-35-112(b)(2) (2006). The trial court sentenced the Defendant to eighteen years for his conviction for sale of more than .5 grams of a Schedule II controlled substance. *See* T.C.A. § 40-35-112(a)(3). Although the trial court misapplied enhancement factor (13)(A) to enhance the Defendant's sentence, the trial court properly applied enhancement factor (1), that the Defendant had a long history of criminal conduct, to his conviction. Also, as we have explained, no mitigating factors apply to the Defendant's conviction. In light of the applicable enhancement factor, the absence of any mitigating circumstances, and the nature and circumstances of the Defendant's crime, we conclude that no adjustment of the Defendant's sentence is necessary. *See* T.C.A. § 40-35-210. Accordingly, we affirm the Defendant's sentence of eighteen years for his conviction for sale of more than .5 grams of a Schedule II controlled substance.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude that the trial court erred in sentencing the Defendant but that under de novo review his eighteen-year sentence is nonetheless appropriate. Accordingly, we affirm the sentence of eighteen years imposed by the trial court.

ROBERT W. WEDEMEYER, JUDGE